SUPREME COURT, U. S.

FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 394

ROY SETH HALE,
Petitioner,

v.

TOWN OF VINTON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

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TO: THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Roy Seth Hale, of Roanoke, Virginia, respectfully prays that a Writ of Certiorari be issued by the above-styled Court to review the judgment of the Supreme Court of Appeals of Virginia, rendered on April 19, 1967 in denying petitioner's Petition for Writ of Error di-

rected to said Court in regard to appeal of an adverse judgment rendered in the Circuit Court of Roanoke County, Virginia on November 9, 1966. No official report of this matter has been printed, the Supreme Court of Appeals of Virginia having denied issuance of the Writ of Error sought in said Court.

PROCEEDINGS IN COURTS BELOW

The references made hereinafter are to the pages of the record of the proceedings in the trial court, the Circuit Court of Roanoke County, Virginia, and are numbered in chronological order of filing and shall be referred to as (R), however, the Transcript of Evidence has not been renumbered and shall be referred to by its original page numbers (Tr.)

Roy Seth Hale, petitioner, was convicted by jury verdict in the Circuit Court of Ronoake County, Virginia on November 9, 1966, on a charge of operation of a motor vehicle while under the influence of intoxicants, in violation of Section 33 of the Town of Vinton, Virginia, Ordinance and his punishment was fixed at a fine of $100.00 and by operation of law, license to operate a motor vehicle in the State of Virginia was revoked for a period of one year. Petition for Writ of Error from said Trial Court judgment was filed with the Supreme Court of Appeals of Virginia and the Trial Court judgment was affirmed by said Appellate Court on April 19, 1967. The question involved herein, which was raised in the Trial Court and in the State Appellate Court is as follows:

That the Trial Court erred in permitting evidence of the blood test taken from the Defendant to be admitted in evidence, in that so doing violated Constitutional rights and guarantees.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code § 1257(3).

Upon denial of Petition for Writ of Error by the Supreme Court of Appeals of Virginia (A-1) on April 19, 1967, an Order staying execution of judgment was sought and granted (A-2) on May 5, 1967 in order that petitioner might present this Petition for Writ of Certiorari to review the proceedings below.

28 U.S.C. § 1257(3) provides for review by way of Writ of Certiorari by this honorable Court where a right, privilege or immunity specifically set up or claimed under the Constitution is involved and the constitutional provisions involved herein are as follows, from the Constitution of the United States:

Amendment V

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty,* or property, *without due process of law;* nor shall private property be taken for public use, without just compensation. (emphasis by Counsel).

Amendment VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, *and to have the assistance of counsel for his defense.* (Emphasis by Counsel).

Amendment XIV

Section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.* (Emphasis by Counsel).

Constitutional questions were raised in the Trial Court and in the State Appellate Court.

QUESTION PRESENTED

That the Trial Court erred in permitting evidence of the blood test taken from the Defendant to be admitted in evidence, in that so doing violated Constitutional rights and guarantees it being Petitioner's contention:

(I) That he was denied fair trial.

(II) That he was denied due process of law.

(III) That he was denied equal protection of the law.

STATEMENT OF FACTS

Petitioner's trial, and pre-trial, plan was based upon the testimony given by the Town's Police Officer, James M. Greenway, in the Police Court Hearing and the petitioner's testimony in such regard. The petitioner's evidence in the Trial Court was that request was made for the opportunity to consult counsel before the blood test was taken and that the opportunity for consultation with counsel by petitioner was denied by Officer Greenway until the blood test had been taken. Petitioner's witness, Richard Lawrence, Assistant Commonwealth's Attorney for the City of Roanoke,

who happened to be an interested spectator in the Police Court Hearing, testified (R-24):

> A. As I recall the testimony, you brought out on cross examining Officer Greenway that he was told he would be allowed to call an attorney, I don't know whether an Attorney's name was ever mentioned or not, but he would be allowed to call an attorney after he had been processed by the Police Department in Vinton.
>
> Q. And then was particular inquiry made of Officer Greenway as to what he meant by being processed?
>
> A. You asked him that question, and, as I recall it, Officer Greenway stated that after he had been booked, or whatever words he used, and after he had been – after he submitted – or had taken a blood test.
>
> Q. And then after that, he would be permitted to call a lawyer.
>
> A. Well, as I understood it, and as I remember, that he was told – that that was what Officer Greenway explained to you that he meant by processing.
>
> Q. All right. That he, Officer Greenway, meant by being processed, that after they got his blood, then he could call an attorney?
>
> A. That's the way I understood it.

The Town's Officer, Mr. Greenway, testified that no request for counsel or opportunity to make a phone call was made by the petitioner before the blood test was taken, (R. 5), however, there was no rebuttal of the testimony of petitioner's witness Lawrence. There is no question whatsoever in the evidence of the case about the proposition that the petitioner never was advised as to his right to counsel or as to his other constitutional rights. See testimony of Officer Greenway (R. 14):

> Q. Mr. Greenwood, at no time did you advise Mr. Hale of his right to counsel, did you?

A. No, sir, I didn't.

Q. All right, sir, and – you say he made no request for Counsel?

A. No, sir.

Q. You are positive of that?

A. Yes, sir.

Petitioner testified that he had consumed seven or eight bottles of beer over a period of 3½ hours preceding his arrest (R. 29). Officer Greenway testified that the petitioner was "passed out" the biggest part of the time after he was placed under arrest prior to the taking of the blood sample (R. 5 and R. 18).

REASON FOR ALLOWANCE OF CERTIORARI

The basic issue herein is whether or not one charged with a misdemeanor is entitled to the great constitutional rights which others charged with crimes are, and in particular the right to be advised as to the right to counsel. The right to be advised as to the right to counsel is a basic prerequisite to due process of law – and the ultimate question is does the Constitution guarantee due process of law to one charged with a misdemeanor.

The dilemma of the Trial Judge in applying the great constitutional decisions cited hereinafter in the evolving law of the land is a perplexing one, which this honorable Court should resolve for the bar, bench and people of this land. The criminal defense bar may argue forever to the Trial Courts that the "law of the land" extends to misdemeanants, but until this honorable Court rules positively on the subject, the issue is still debatable and unresolved – to the confusion of justice. See the dissenting opinion by Mr. Justice Stewart in the October 17, 1966 Denial of a Petition for Writ of Certiorari to the Supreme Court of the United States from the Supreme Court of Arkansas in the case of *Winters v. Beck*, 87 S.Ct. 208, 17 L. Ed. 2d 137 at 138:

This decision of the Supreme Court of Arkansas is in conflict with decisions of the United States Court of Appeals for the Fifth Circuit, which has held that indigent defendants have a constitutional right to counsel in misdemeanor cases. McDonald v. Moore, 353 F.2d 106; Harvey v. Mississippi, 340 F.2d 263. This conflict must be resolved, unless the Constitution of the United States is going to mean one thing in in Arkansas and something else in Mississippi.

In Gideon v. Wainwright, supra, we said that "any person hailed into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth." No State should be permitted to repudiate those words by arbitrarily attaching the label "misdemeanor" to a criminal offense. I think this Court has a duty to resolve the conflict and clarify the scope of Gideon v. Wainwright. I do not suggest what the ultimate resolution of this problem should be, but I do suggest that the answer cannot be made to depend upon artificial or arbitrary labels of "felony" or "misdemeanor" attached to criminal offenses by 50 different States. Whatever one's view may be as to the appropriate exercise of this Court's certiorari jurisdiction, surely it is at least our duty to see to it that a vital guarantee of the United States Constitution is accorded with an even hand in all the States.

For these reasons I would grant certiorari, hear argument and decide the important issue which this case clearly presents.

Mr. Justice Black would also grant the petition for certiorari.

ARGUMENT

It is conceded that the evidence of the case may have been such that the petitioner might have been convicted without the introduction of the evidence as to the blood test and the analysis of same. However, certainly there can be no real question that the evidence introduced as

to the blood test was prejudicial and that petitioner should be awarded a new trial if the introduction of the evidence of the blood test was improper. There are several issues presented in regard to the erroneous action of the Trial Court in admitting the evidence as to the blood test and analysis: (1) The Arresting Officer, after the arrest, failed to advise the petitioner as to his constitutionally guaranteed right to consult with counsel and of his right to not give evidence against himself and thereby incriminate himself; and (2) The denial of the right to consult counsel upon request for such consultation.

Under the Statute Law of Virginia the so-called and often misnamed "Drunk Driving Law" pertaining to operation of a motor vehicle while under the influence of intoxicants and/or narcotics, Code § 18.1-54, § 18.1-58, and § 18.1-59 (A-3) providing for penalty, make the violation of said Statute a misdemeanor crime and provide for maximum punishments (for a first offense) of up to a One Thousand Dollar fine or by confinement in jail for not less than one month nor more than six months, either or both. The alleged Town Ordinance provides for the same maximum punishment, although having a lesser minimum fine, the Town's being One Hundred Dollars and the State's being Two Hundred Dollars. The Virginia Implied Consent Law, and the Town Ordinance upon which same is purportedly based, is not a mandatory law requiring one to submit to a blood test when charged with the operation of a motor vehicle while under the influence, as appears to be the law under certain of the other States. See § 18.1-55.1(c), Code of Virginia (A-3) which does not require a defendant to submit to the taking of a blood sample, although a defendant may be subject to a further charge for his refusal to do so. The Virginia Court ruled in the case of *Walton v. City of Roanoke* (1963), 204 Va. 678, 133 S.E.2d 315, that the Implied Consent Statute of Virginia does not violate Section 8 of Article 1 of the Virginia Constitution and holding that said state constitutional provision, like its federal counterpart, is designed to protect an accused against the em-

ployment of legal process to exact an admission of guilt and does not extend beyond testimonial compulsion. The Virginia Law provides a choice. A defendant is not compelled to submit to the blood test and, by statute, his refusal cannot be used as evidence in his trial on the charge of driving under the influence of intoxicants.

This is not the case under the laws of some of the States. See *Schmerber v. State of California,* (1966), 384 US 436, 16 L ed2d 694, 86 S Ct 1602, wherein it was held that since the accused was not entitled to assert his privilege against self incrimination with respect to introduction of evidence of blood test in prosecution for driving while under influence of intoxicating liquor, compelling petitioner to submit to test in face of fact that his objection to test was made on advice of counsel did not constitute denial of petitioner's Sixth Amendment right to assistance of counsel. This is an important and vital distinction, since under Virginia Law the taking of the blood test is not mandatory. It is respectfully submitted that it is absolutely vital in a case of an operation under the influence charge that the defendant have guidance and advice of counsel in order that due process may be had.

Obviously, the case has passed the investigatory stage and a defendant has been placed under arrest before the question of the blood test is presented. The Virginia Legislature wisely and fairly recognized the dilemma of one faced with a charge of operation of a motor vehicle while under the influence and that such a defendant should not be left to the tender mercy of the arresting officer, or other members of the Police Department, and left to the counsel, guidance and advice of the police arm of the government in enacting Code § 18.1-55.1 (c) which provides in the event of refusal to take the test:

> . . . The arresting officer shall take the person arrested before a committing magistrate and if he does again so refuse after having been further advised by such magistrate of the law requiring a blood test to be taken and the penalty for refusal,

> and so declares again his refusal in writing upon a form provided . . .

Therefore, Virginia recognizes the right and need of counsel and the serious question of individual rights involved as guaranteed by the constitutions. Now we approach the great iceberg-like problem of constitutional rights of one charged with a misdemeanor. To slice through to the heart of the matter, it must be recognized that an incriminating statement or admission to test, must be elicited for a constitutional right to be violated. See *Escobedo v. Illinois,* (1964), 378 US 478, 84 S Ct 1758, 12 L ed 2d 977. The constitutional rights in the case at bar is the right to remain silent and not give evidence against oneself and to be advised, by the arresting officer, as to said right and the right to consultation with counsel.

Of course, an arresting officer need not close his ears to voluntary statements made by a person in his presence, *Ward v. Commonwealth,* (1964), 205 Va. 564, 138 S.E.2d 293. The learned Trial Judge in the case at bar apparently felt that there was no duty on the part of the arresting officer to advise defendant as to his constitutional rights and that evidence of blood test was therefore proper evidence (R. 41):

> THE COURT: Which motions the Court overrules. Number 1: the Defendant himself did not state he refused to take a blood test, but on the other hand said he wanted to take the blood test, and did so before he had ever requested Counsel. *That this would go to whether or not he was entitled to Counsel as a matter of law, which the Court rules is not required on a misdemeanor charge.* (Emphasis by Counsel).

It is respectfully submitted that the case at bar must be viewed in light of the *Escobedo* case, supra, and *Miranda v. Arizona,* (1966), 384 US 757, 16 L ed 2d 694, 86 S Ct 1602 dealing with the constitutional prerequisites as to admissibility of evidence taken from a defendant without advising him as to constitutional rights. Further, in the case

at bar, we have the most serious question as to intelligent waiver of constitutional rights involved, if indeed there was any waiver, and it is submitted that there was not, taking into consideration the petitioner's education (R. 3, third grade), apparent physical condition to arresting officer (R. 5 and R. 11, passed out) and apparent intelligence (R. 7, Direct Examination of Petitioner on motion in limine), as follows:

> Q. And what happened after you reached the Town of Vinton police station? Tell us in your own words.
>
> A. He asked me did I want to take the blood test, he said if I didn't take it he would have to charge me with refusing to take it. I asked him to call an attorney before he aimed to take me to git the blood test, and he said after I got the blood test I could call an attorney.
>
> Q. Now did you make any specific request in regard to this telephone call to an attorney?
>
> A. No, sir.
>
> Q. Do you know what specific means?
>
> A. No, sir.

It was held in the *Miranda* case, at 384 US 694, that "As a constitutional prerequisite to the admissibility of such statements, the suspect must, in the absence of a clear, intelligent waiver of the constitutional rights involved, be warned prior to questioning that he has a right to remain silent, and that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." Also see Annotation on accused's right to assistance of counsel at or prior to arraignment, 5 ALR3d 1269, and in particular page 1287 § 6, Duty of Police Upon Investigation: "With the rules in Escobedo and later cases that under certain circumstances, a suspect is entitled to the assistance of counsel at the police investigatory state, a new duty seems to have been imposed on arresting police officers before they commence inter-

rogation, namely, that of advising the suspect of his right to counsel and of his right against self-incrimination and, if the suspect desires counsel, of helping him to procure the services of one."

The pivotal question is whether the aforesaid duty upon an arresting officer to advise an accused with a full and fair statement of the accused's constitutional rights is applicable to a misdemeanor, and in particular the misdemeanor involved in the case at bar. However, it should be remembered that the jury's verdict does not constitute a finding of fact that the arresting police officer was correct in his testimony, and that the petitioner and the Assistant Commonwealth Attorney of the City of Roanoke testifying for petitioner were wrong, in regard to petitioner's position that petitioner requested consultation with an attorney before the blood test was taken and was told that he could not have consultation with counsel until after the blood sample had been withdrawn from his body. The Fifth Circuit Court of Appeals has ruled, in a series of recent cases, as quoted from *Pamplin v. Mason* (1966), 364 F.2d 1, at page 7:

> The Irvin v. Dowd line of cases involves capital crimes. We are of the view, however, that the same constitutional safeguard of an impartial jury is available to a man denied his liberty – here two years – for a misdemeanor as for a felony. See Harvey v. State of Mississippi, 5 Cir. 1965, 340 F.2d 263 (90-day sentence); McDonald v. Moore, 5 Cir. 1965, 353 F.2d 106 (6-month sentence).

The *Pamplin* case involved a defendant convicted in the Texas State Court of a misdemeanor, namely aggravated assault upon a local peace officer. The *Harvey* case involved a conviction in the Mississippi State Court upon a charge of possession of whiskey, a misdemeanor punishable under the Mississippi Statute of fine of up to Five Hundred Dollars and up to ninety days in jail. The *McDonald* case concerned a conviction in the Florida State Court on two misdemeanor charges of illegal sale of whis-

key and of illegal possession of whiskey, said offenses being misdemeanors under the Florida Statutes. The *Harvey* and *McDonald* cases specifically involve, and turn upon, the respective defendant's right to assistance of counsel in misdemeanor cases. *McDonald* quotes with approval at 353 F.2d 109, the Court's quotation approved in *Harvey* from *Evans v. Rives,* (1942 D.C. Cir.) 75 U.S. App.D.C. 242, 127 F.2d 623 a case involving a federal misdemeanor:

> It is * * * suggested * * * that the constitutional guaranty of the right to the assistance of counsel in a criminal case does not apply except in the event of 'serious offenses.' No such differentiation is made in the wording of the guaranty itself, and we are cited to no authority, and know of none, making this distinction. The purpose of the guaranty is to give assurance against deprivation of life or liberty except strictly according to law. The petitioner would be as effectively deprived of his liberty by a sentence to a year in jail for the crime of non-support of a minor child as by a sentence to a year in jail for any other crime, however serious. And so far as the right to the assistance of counsel is concerned, the Constitution draws no distinction between loss of liberty for a short period and such loss for a long one. 126 F.2d at 638.

In the aforesaid misdemeanor cases coming from State Courts into the Federal Court via habeas corpus, the accused misdemeanants were ignorant and illiterate folk who obviously needed guidance of counsel. There is little to distinguish the aforesaid cases from the instant appellate matter, except that in a charge of operation under the influence the most vital time of the case, both from the point of the prosecution and of the defense, is what the facts are at, or immediately after, the arrest. As set forth in *Escobedo,* the Supreme Court of the United States of America held (378 US 490, 84 S Ct 1765):

> We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but (1) has begun to focus on a particular suspect, (2) the suspect has been taken into police custody, (3) the police carry out a process of interrogations that lends itself to eliciting incriminating statements, (4) the suspect has requested and been denied an opportunity to consult with his lawyer, and (5) the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment,' Gideon v. Wainright, 372 US at 342, 83 S Ct at 795, and that no statement elicited by the police during the interrogation may be used against him at a criminal trial.

In the case at bar, all of the Escobedo requisites are present, with the distinction being that instead of a confession obtained from the defendant, a blood sample was obtained, which distinction changes not the principles involved in his deprivation of constitutional rights. It is respectfully submitted that the evidence as to the blood test should have been excluded from the evidence of the case in the Trial Court and that failure to so do was prejudicial and reversible error. The Constitution of the United States, Amendment VI, provides:

> *In all criminal prosecutions,* the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and *to have the assistance of counsel for his defence.* (Emphasis by counsel)

The constitutional right to counsel and the right to be informed as to this right and other constitutional rights so as to be afforded due process of law has been there for all these many years, but went almost uniformly disregarded and unheeded until the last few years when and after the United States Supreme Court announced the law of the land in this field. See *Miranda v. Arizona, supra,* at 16 L ed 2d 694, 705:

> We start here, as we did in Escobedo, with the premise that our holding is not an innovation in our jurisprudence, but is an application of principles long recognized and applied in other settings. We have undertaken a thorough re-examination of the Escobedo decision and the principles it announced, and we reaffirm it. That case was but an explication of basic rights that are enshrined in our Constitution – that "No person. . . shall be compelled in any criminal case to be a witness against himself," and that "the accused shall . . . have the Assistance of Counsel" – rights which were but in jeopardy in that case through official overbearing. These precious rights were fixed in our Constitution only after centuries of persecution and struggle. And in the words of Chief Justice Marshall, they were secured "for ages to come and . . : designed to approach immortality as nearly as human institutions can approach it," Cohens v. Virginia, 6 Wheat. 264, 387, 5 L.ed 257, 287 (1821).

also see at 16 L ed 2d 721, in *Miranda v. Arizona:*

> An individual need not make a pre-interrogation request for a lawyer. While such request affirmatively secures his right to have one, his failure to ask for a lawyer does not constitute a waiver. No effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings we have delineated have been given. The accused who does not know his rights and therefore does not make a request may

be the person who most needs counsel. As the California Supreme Court has aptly put it:

"Finally, we must recognize that the imposition of the requirement for the request would discriminate against the defendant who does not know his rights. The defendant who does not ask for counsel is the very defendant who most needs counsel. We cannot penalize a defendant who, not understanding his constitutional rights, does not make the formal request and by such failure demonstrates his helplessness. To require the request would be to favor the defendant whose sophistication or status has fortuitously prompted him to make it." People v. Dorado, 62 Cal.2d 338, 351, 398 P.2d 361, 369-370, 42 Cal. Rptr. 169, 177-178 (1965) (Tobrimer, J.).

In Carnley v. Cochran, 369 U.S. 506, 513, 8 L.ed 2d 70, 75, 82 S.Ct. 884 (1962), we stated: "It is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend upon a request." This proposition applies with equal force in the context of providing counsel to protect an accused's Fifth Amendment privilege in the face of interrogation. Although the role of counsel at trial differs from the role during interrogation, the differences are not relevant to the question whether a request is prerequisite.

Accordingly, we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation under the system for protecting the privilege we delineate today. As with the warnings of the right to remain silent and that anything stated can be used in evidence against him, this warning is an absolute prerequisite to interrogation. No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead. Only through such

a warning is there ascertainable assurance that the accused was aware of this right.

> If an individual indicates that he wishes the assistance of counsel before any interrogation occurs, the authorities cannot rationally ignore or deny his request on the basis that the individual does not have or cannot afford a retained attorney. The financial ability of the individual has no relationship to the scope of the rights involved here. The privilege against self-incrimination secured by the Constitution applies to all individuals. The need for counsel in order to protect the privilege exists for the indigent as well as for the affluent. In fact, were we to limit these constitutional rights to those who can retain an attorney, our decisions today would be of little significance. The cases before us as well as the vast majority of confession cases with which we have dealt in the past involve those unable to retain counsel.

See 5 ALR3rd 1275: "It is now generally settled, following *Hamilton v. Alabama,* (1961), 368 US 52, 7 Led2d 114, 82 S. Ct. 157, that an accused is entitled to the assistance of counsel at a 'critical stage' of the state's criminal proceedings, and this stage may occur before arraignment, and indeed, as early as the police investigation stage under certain circumstances. The following post-Hamilton cases, expressly or by implication, recognize, 'criticalness' of the stage of the proceedings in question as the most important factor in determining the time at which the right to the assistance of counsel arises."

How can it seriously be said that one charged with operation of a motor vehicle while under the influence of intoxicants is not faced with a serious charge? Plaintiff in error could have received punishment of up to a thousand dollar fine and jail sentence of six months. The circumstances that he has been fined $100 changes not the seriousness of the criminal charge made against him. Let us not be led astray by the great cry of the prosecutor

that he cannot effectively prosecute in an operation while under the influence charge if a defendant be granted his constitutional right to be advised as to right of counsel, etc.

Let it not be seriously heard that a defendant's constitutional rights can be violated and disregarded before this Honorable Court simply because compliance with the requirements of constitutional rights may cause some problems and difficulty for the arresting officer. If guaranteeing constitutional rights makes the Implied Consent Law unworkable, it is the fault of the General Assembly of Virginia, but it is not unenforceable at all in that a conviction may be made even though the defendant declines to take a blood test.

Of course, in the case at Bar, petitioner's defense was greatly prejudiced by the admission into evidence of the blood test upon which the Court instructed the Jury that the law presumed the defendant to be under the influence of intoxicants. Petitioner was prejudiced by failure to advise as to right of counsel by arresting officer.

CONCLUSION

It is respectfully submitted that the Petition of Roy Seth Hale herewith made for issuance of Writ of Certiorari should be granted upon the facts and circumstances of the trial of his case as reflected by the record of same and that the case should be remanded for new trial, in accordance with the law and constitutional guarantees so as to accord petitioner due process of law and not deprive him of constitutional rights, which were denied him in the failure to exclude the evidence of the blood test in the Trial Court.

PRAYER

Accordingly, petitioner prays that the Writ of Certiorari be granted.

Respectfully submitted,

ROY SETH HALE
By Counsel

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Attorney for Petitioner

PROOF OF SERVICE

I, John K. Brewer, Office Manager of Thiel Press, printer of the within petition for petitioner, depose and say that on the 18th day of July, 1967, copies of the foregoing petition were served in accordance with Rule 33 of the Rules of the Supreme Court of the United States, by mailing a copy of same, with first class postage prepaid, to the following counsel of record:

RICHARD S. TILLEY
Attorney for the Town of Vinton
Attorney at Law
126 East Lee Avenue
Vinton, Virginia 24179

John K. Brewer

Subscribed and sworn to before me at Washington, D.C., this 18th day of July, 1967.

Notary Public

My Commission expires: _____